

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

APEXART CURATORIAL PROGRAM,
INC.,

Plaintiff,

v.

BAYSIDE ROLLERS LLC, ABIGAIL
CARSWELL, BAYSIDE HOSPITALITY
LLC, a Washington Limited Liability
Company, and AMERICAN URBAN ART
AND GRAFFITI CONSERVATION
PROJECT, a Washington Non-Profit
Corporation,

Defendants.

No. 2:22-cv-01807-TSZ

**DECLARATION OF STEVEN RAND
IN SUPPORT OF PLAINTIFF
APEXART CURATORIAL
PROGRAM, INC.'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

I, Steven Rand, declare that:

1. I am over the age of 18 years and I am competent to testify as to the matters stated herein.

2. I am the am the executive director and founder of Apexart Curatorial Program, Inc. ("Apexart").

I declare under penalty of perjury that the foregoing is true and correct.

3. Apexart is a 501(c)(3) registered non-profit educational arts institution.

4. Our mission is to contextualize and consider new and controversial ideas. We have served a notable role in giving opportunities to young and lesser known artists and curators and

1 opening the art world to underrepresented communities in New York and elsewhere. Apexart has
2 worked with many artists and curators to provide that all important exposure at a crucial time in
3 their career at Apexart and are now noted.

4 5. I formed Apexart Curatorial Program in 1994. We hosted our very first exhibition
5 in New York, New York from May 6 to June 18, 1994.

6 6. Both the mark APEXART and Apexart Curatorial Program have global recognition
7 and widespread recognition within the art industry.

8 7. Apexart's art gallery in New York, New York hosts regular exhibitions, which are
9 always free and open to the public.

10 8. To date, Apexart has presented 243 exhibitions in 33 countries and given
11 professional exposure to more than 1200 artists.

12 9. Apexart provides non-profit, educational art-related services, directed at both the
13 general public and art enthusiasts alike, with the intent to promote art appreciation and education.
14 Apexart's outreach is targeted to a wide range of individuals and organizations. Plaintiff's exhibits
15 are free to the public, and its outreach online provides free educational opportunities. While most
16 of its audience is familiar with contemporary art (including the graffiti based artwork Bayside
17 intends to exhibit), Apexart increases its audience as a result of popular topics often addressed.

18 10. Apexart's educational fellowship program has hosted more than 210 artists and
19 curators from over 50 different countries, including artists from Portland and Seattle. More than
20 210 artists and curators from New York City and more than 50 countries have participated in a
21 "life changing" (a word used by many of the participants) Apexart Fellowship. In 2022, 96% of
22 our curators were women and 83% identified as BIPOC. Additionally, 80% of our artists were
23 women and 72% identified as BIPOC. In 2022, 83% of our fellows identified as BIPOC and 66%
24 as Women, trans or nonbinary.

25 11. Apexart has hosted exhibits in various cities and countries showcasing a wide range
of artists and genres of art.

1 12. Exhibit 1 is a true and correct copy of Apexart's website, as of September 28, 2023
2 featuring the exhibitions hosted by Apexart at various locations, including over 50 countries,
3 available at <https://apexart.org/pastexhibitions.php>.

4 13. Exhibit 2 contains true and correct excerpts of Apexart's website, as of September
5 28, 2023, featuring the past fellowships awarded to artists from Seattle and Portland. A complete
6 list of the artists is available at <https://apexart.org/pastfellows.php>.

7 14. Apexart selects its exhibitions through Open Calls. This crowd-sourced process
8 engages students and the community from around the country to participate as jurors and seeks to
9 elevate artists and curators based on their ideas and ability to communicate them, rather than pre-
10 existing connections or prestige in the art community.

11 15. Throughout the nation and internationally, Apexart offers free online arts events
12 and online tours for classrooms.

13 16. Apexart has published five books available for purchase on its website at
14 <https://apexart.org/publications.php> and through Amazon.com: CAUTIONARY TALES: Critical
15 Curating; LIFE BETWEEN BORDERS: The Nomadic Life of Curators and Artists; PLAYING
16 BY THE RULES: Alternative Thinking/Alternative Spaces; THE APEXART FELLOWSHIP: An
17 Experiment in Vertical Cultural Integration; and ON CULTURAL INFLUENCE: Collected
18 Papers from apexart International Conferences 1999-2006.

19 17. Apexart has expended substantial resources promoting its arts related services.
20 Apexart spends significant sums of money each year, including: \$87,000 for full color brochures
21 sent to over 7,000 people, organizations, and institutions in all 50 states and over 80 countries;
22 \$35,000 in digital advertising on websites such as e-flux and hyperallergic; and over \$70,000 in
23 staff time to promote exhibitions and advertise arts-related services under the APEXART mark to
24 the art industry and the consuming public in newspapers, social media, magazines, and in direct
25 mail and electronic mail campaigns. Apexart maintains a regular newsletter reaching
approximately 14,000 readers per month, including individuals located in Washington State.

1 Apexart has sent over two million mini catalogs of exhibition over the past nearly 30 years of
2 operation, including approximately 7,000 sent for each exhibition (typically nine times per year)
3 to over 65 countries.

4 18. Apexart is featured in newspapers and journals with broad national and
5 international reach. Publications that have featured Apexart include ARTnews, Art & Education,
6 Apollo Magazine, The New Yorker, Der Spiegel, Entertainment Tonight and The New York Times.

7 19. Exhibit 3 contains true and correct copies of articles published by ARTNews and
8 the New York Times featuring Apexart.

9 20. Apexart uses social media to promote its programs, services, and offerings.
10 Apexart's Twitter (X) account has about 11,000 followers. Apexart's Facebook account has about
11 7,000 followers. Apexart's Instagram account has approximately 9,000 followers. Its Instagram
12 posts showcase and promote art events and the art and artists featured at Apexart in New York,
13 and globally. The posts are attributed to the username "apexartnyc."

14 21. Exhibit 4 is a true and correct copy of screenshots of Apexart's Instagram posts
15 from October 2022 to August 2023.

16 22. Apexart relies on its website, apexart.org, to promote Apexart, including its
17 exhibitions, programs, publications. The mark "apexart" is prominently featured on the top right-
18 hand corner of the website:



25 23. Apexart's website also includes a link for visitors to provide donations. Apexart
solicits donations from community organizations, private businesses, individuals and

1 organizations that support the arts. Apexart's extensive list of donors includes foundations such as
2 The Andy Warhol Foundation for the Visual Arts and Foundation for Contemporary Arts (FCA);
3 government entities such as the National Endowment for the Arts; foreign agencies and institutions
4 such as the Cultural Services of the French Embassy in New York; corporations; and individuals.

5 24. Exhibit 5 is a true and correct copy of a screenshot of Apexart's website homepage,
6 taken on September 28, 2023, available at <https://apexart.org/index.php>.

7 25. Apexart's website has national reach. As of April 29, 2023 Apexart's website had
8 reached upwards of 60,000 users in the previous year. Users located in Washington State were the
9 eleventh most represented state to visit Apexart's site (with a total of 2,509 visitors). During Open
10 Calls, our website sees even higher traffic, up to 10,000 users per month.

11 26. Exhibit 6 is a true and correct copy of the Google Analytics results from the prior
12 year broken down by geographic location for Apexart's website taken on April 29, 2023.

13 27. Apexart receives significant contributions from its donors. In 2019, it received
14 \$637,470 in contributions and grants. In 2020, it received \$474,890 in grants and contributions. In
15 2021, Apexart received \$535,744 in grants and contributions. In 2022, Apexart received \$719,655
16 in grants and contributions.

17 28. Exhibit 7 includes true and correct copies of Apexart's Form 990s for the years
18 2020-2022, filed with the IRS, and reflecting these grants and contributions.

19 29. Apexart's APEXART mark is registered with the U.S. Patent and Trademark Office
20 ("PTO") under U.S. Registration No. 2609921 as a word mark in standard characters, without any
21 logo and not in any stylized typeface.

22 30. The registration was approved for International Class 41; U.S. Classes 100, 101,
23 and 107.

24 31. The mark's first use in commerce was at least as early as June 1, 1994.

25 32. Exhibit 8 is a true and correct copy of the status of registration for status of
registration for the APEXART mark, available at the USPTO's website.

1 33. On November 1, 2007, I filed a Combined Declaration of Use and Incontestability
2 Under Sections 8 & 15 with the USPTO.

3 34. Exhibit 9 is a true and correct copy of the Combined Declaration of Use and
4 Incontestability Under Sections 8 & 15.

5 35. Exhibit 10 is a true and correct copy of the U.S. PTO's acceptance of APEXART's
6 incontestability under Section 15 (15 U.S.C.A. § 1065).

7 36. As part of its efforts to protect and maintain its trademark, Apexart engages an
8 online alert system to notify it of potential unauthorized use of its mark.

9 37. In May of 2022, Apexart was alerted through Google alerts of a press release
10 announcing the future opening of "APEX Art Center" in Everett, WA, an arts center unaffiliated
11 with Apexart.

12 38. Under my direction, Apexart engaged counsel at Duane Morris in response to this
13 information. On June 8, 2022, counsel for Apexart, at my direction, sent a cease-and-desist letter
14 via email to the contact they identified at APEX Art and Culture Center, John Carswell.

15 39. I understand that Mr. Carswell rejected Apexart's demand that it cease and desist
16 and offer to forgo litigation.

17 40. Shortly thereafter, I discovered that Defendant Abigail Carswell had filed an
18 application to federally register the mark APEX Art and Culture Center after our counsel sent the
19 cease and desist letter. Apexart filed a letter of protest to that application, explaining that there was
20 a likelihood of confusion with Apexart's mark.

21 41. Exhibit 11 is a true and correct copy of the letter of protest, filed by Apexart, to the
22 trademark application for APEX Art and Culture Center.

23 42. Through its counsel and under my direction, Apexart filed a complaint for
24 trademark infringement against Bayside Rollers LLC and Abigail Carswell on December 21, 2022.

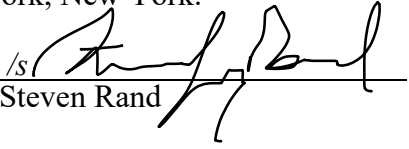
25 43. I understand that the U.S. Patent and Trademark Office subsequently issued a
nonfinal order refusing the application based on a likelihood of confusion with the APEXART

1 mark.

2 44. Since its founding in 1994, Apexart has cultivated and maintained significant
3 goodwill associated with the APEXART mark.

4
5 I declare under penalty of perjury under the laws of the United States and State of
6 Washington that the foregoing is true and correct to the best of my knowledge.

7 Signed this 27th day of November, 2023 at New York, New York.

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9 Steven Rand

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